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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1998

PEOPLE OF THE STATE OF MICHIGAN
Petitioner,
vs,

JERRY L. BASS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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109 PP

QUESTION PRESENTED

IS A COURT RULE WHICH ONLY PERMITS AN INDIGENT DEFENDANT ON THE APPEAL OF RIGHT TO RECEIVE THE JURY VOIR DIRE TRANSCRIPT WHEN DEFENDANT HAS EITHER (1) CHALLENGED THE JURY ARRAY, (2) EXHAUSTED ALL PEREMPTORY CHALLENGES, (3) RECEIVED A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE, OR (4) SHOWN GOOD CAUSE, VIOLATIVE OF THE SIXTH AMENDMENT BY "INTERFERING" WITH THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS HELD BY THE MICHIGAN COURT OF APPEALS AND CONFIRMED BY THE MICHIGAN SUPREME COURT, WHICH ABROGATED THE RULE FOR THIS REASON?

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1998

PEOPLE OF THE STATE OF MICHIGAN
Petitioner,
vs,

JERRY L. BASS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

NOW COMES the People of the State of Michigan, Petitioner, through John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief, research, Training & Appeals, and Carolyn M. Breen, Assistant Prosecuting Attorney and prays that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered May 6, 1998.

OPINIONS AND ORDERS BELOW

The May 6, 1998 order of the Michigan Supreme Court is appended below as Appendix A.

The August 4, 1997 order of the Michigan Supreme court is entered as Appendix B. The July 25, 1997 opinion of the Michigan Court of Appeals, on Rehearing is appended below as Appendix C. The June 19, 1997 order of the Michigan Supreme Court is entered as Appendix D. The April 25, 1997 opinion of the Michigan Court of Appeals is appended below as Appendix E.

STATEMENT OF JURISDICTION

The order of the Michigan Supreme Court was entered on May 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defenses *U.S. Const. Amend. VI.* Further, this has been applied to the States through the Fourteenth Amendment to the United States Constitution which provides: it . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. Amend. XIV.*

STATEMENT OF THE CASE

The respondent was tried before a jury on May 4-6, 1994 on the charges o delivery of less than fifty grams of cocaine, in violation of MCLA 333.7401(2)(a)(iv) and possession with intent to deliver less than fifty grams of cocaine, in violation of MCLA 333.7401(2)(a)(iv). The case (Recorder"s Court No. 93-009499) arose from an undercover buy and bust narcotics operation in the city of Detroit. The respondent and another were observed by the police when the codefendant was flagging down motorists as they passed by. A Detroit Officer approached the codefendant and inquired to purchase cocaine. Twenty dollars in prerecorded funds were paid to the codefendant and passed to respondent. The respondent gave the codefendant the cocaine which was passed to the officer.

The respondent was found guilty on May 6, 1994. The respondent pled guilty on a plea agreement to habitual offender. The respondent was sentenced on Count I to 8 to 20 years and on Count II to 8 to 20 years. Those sentences were vacated and the respondent was sentenced to 12 to 20 years on the habitual second.

On April 25, 1997, the Michigan Court of Appeals remanded the matter back to the trial court based on respondent's argument in the Court regarding Michigan Court Rule, MCR 6.425, which provided that transcripts on appeal were to be prepared as follows:

> "(2) order to Prepare Transcript. The appointment order also must (a)direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, (i) the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause,.."

The Court of Appeals found that the court rule did not allow appointed appellate counsel to faithfully discharge the duties imposed by the Appellate defender Commission and the Supreme Court. The Court found that transcript of the jury voir dire must be provided to all defendant where appointed appellate counsel was not the indigent defendant's trial counsel. The Court found troubling the argument of the defendant's that it violated his right to effective assistance of counsel.

On July 25, 1997 the Court of Appeals in a published opinion, on rehearing continued the remand of the matter to the trial court

for the same reasons stated in the April opinion.

On June 19, 1997 the Michigan Supreme Court granted petitioner's application for leave to appeal and stayed the precedential effect of the April 25, 1997 judgement of the Court of Appeals regarding the holding that indigent defendants are entitled to a transcript of the jury voir dire without satisfying MCR 6.425(F)(2)(a)(i). On August 4, 1997 the Michigan Supreme Court denied the motion for reconsideration of the order of June 19, 1997. The order of June 19, 1997 was to remain in effect and be treated as also staying the precedential effect of the July 25, 1997 judgement of the Court of Appeals regarding providing indigent defendants the jury voir dire transcript.

On May 6, 1998 the Michigan Supreme court entered an order vacating the order of August 4, 1997 which granted leave to appeal and denied leave to appeal. The Court stated that the "impediments of the court rule constitute state interference with appellate counsel's ability to provide effective assistance of counsel", thus violating the defendant's Sixth Amendment Right to effective assistance of counsel. The Michigan Supreme Court consequently,

amended the Court Rule to provide the transcript of jury voir dire to all indigent defendants.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals found troubling:

> ". . . defendant's argument that MCR 6.425 is unconstitutional because it violates his right to effective assistance of counsel. Where a state grants criminal defendants an appeal of right, it must also provide indigent defendants with an attorney to represent them on appeal. *Douglas v California,* 372 US 353, 358; 83 S Ct 814; 9 L Ed 2d 811 (1963) Under the Due Process Clause of the Fourteenth amendment, a criminal defendant is entitled to the effective assistance of counsel in his appeal of right. *Evitts v Lucey,* 469 US 387, 396; 105 S Ct 830; 83 L Ed 2d 821 *(1985)."*

The Court thus found the defendant was denied his Sixth Amendment Right to effective assistance of appellate counsel. Thereafter, the Michigan Supreme Court affirmed the ruling , not on the finding that the appellate counsel failed to comply with the minimum standards for assigned counsel, but rather that the court rule constituted state interference "with appellate counsel's ability to provide effective assistance.." Case law does not support that proposition.

As noted in *McCann v Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970) the Court has recognized that "the right to counsel is the right to effective assistance of counsel."

The Court has disfavored actions by the state which interfere with a defendant's right to a fair trial. *Strickland v Washington*, 466 U.S. 686, 104 S.Ct. 2052, 2963, 80 L.Ed.2d 674 (1984) noted, "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."

The Court recognized as interference the bar on attorney-client consultations during an overnight recess in *Geders v United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976). In *Herring v New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) the bar on summation at a bench trial was recognized as state interference with the right to effective assistance of counsel. The requirement that the defendant be the first defense witness was barred as state interference in *Brooks v Tennessee*, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972). In each

instance there were state created procedures which interfered with the exercise of the fundamental right to counsel.

In Ake v Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985) the Court stated:

> "Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system." *Id.*, at 612, 94 S.Ct., at 2444."

It was in *Ake*, *supra*, that the Court looked at whether the Constitution requires that indigent defendants have access to psychiatric examinations and the assistance necessary to prepare an effective defense based on mental condition and sanity at the time of the offense.

> "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the

> defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id.*, at 470 U.S. at 76, 94 S.Ct. at 1092.

The Court held ultimately, that when defendant is able to make *a threshold showing* to the trial court that his sanity at the time of the offense was to be a significant factor at the trial , then the State must assure access to a competent psychiatrist to conduct an examination and assist in the evaluation, preparation, and presentation of the defense.

This holding should be equally as applicable to the providing of the transcript of voir dire to an indigent defendant, that a "threshold showing" of need is Constitutionally permissible.

The watershed case on the right of indigent defendants to obtain transcripts on the appeal of right is *Griffin v Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956). The Court has recognized the Constitutional right of defendants to receive the transcript on the appeal of right. Although a defendant has a right to a transcript

on appeal, the Court has never indicated that an indigent defendant must be provided with the entire transcript of the trial.

In *Eskridge v Washington*, 357 U.S. 214, 216, 78 S.Ct. 1061, 1062, 2 L.Ed.2d 1269 (1958) it was stated:

> "The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript. **We do not hold that a State must furnish a transcript in every case involving an indigent defendant.** But here, as in the Griffin case, we do hold that, (d)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Griffin v People of State of Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 591.6 [Emphasis added.]

The matter of providing transcripts to indigent defendants appeared again before the Court in *Draper* v *Washington*, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). It was the procedure in the Washington courts which the Court in Draper condemned. The Court reaffirmed the principles set forth in *Griffin* indicating that

> "A State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. [Cite omitted.] Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the

appellant's contentions arise." *Id.* at 83 S Ct at 779.

The Court further recognized, that

> "Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." *Id.* at 83 S.Ct. 779

The Court recognized that with allegations as to validity of the statute or sufficiency of the indictment upon which the conviction is based then the transcript is irrelevant and need not be provided. If on the other hand the allegations of error are as to rulings on the evidence or sufficiency of the evidence the transcript provided might well be limited to the parts of the transcript relevant to those errors.

> "In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds the State must provide the indigent defendant with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." *Id.* at 83 S.Ct. 779

Hardy v *United States*, 375 US 277, 84 S Ct 424, 11 L Ed 2d

331 (1964) examined the appellate process in federal court where it was the practice adopted by the United States Attorney for the District of Columbia was to furnish to indigents the full transcript if the cost was no more than $200. The Court noted that under *Coppedge*, *supra*, counsel for an indigent defendant received at minimum the transcript which is relevant to the errors claimed.

The *Hardy* Court made the finding based on statutory schemes rather than constitutional requirements and concluded:

> "We conclude that this counsels duty cannot be discharged unless he has **a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecutions**" *Hardy* at 84 S.Ct. 428 [Emphasis added.]

In *Mayer* v *City of Chicago*, 404 US 189, 92 S Ct 410, 30 L Ed 2d 372 (1971) the Court continued to observe the holdings of the prior cases. The Court stated that a State must provide a record of "sufficient completeness" to permit proper consideration of the defendant's claims." *Mayer* at 92 S Ct at 413.

> "A record of sufficient completeness' does not translate automatically into a complete verbatim transcript. We said in Griffin that a State 'may find other means (than providing stenographic transcripts for) affording adequate

and effective appellate review to indigent defendants."

351 U.S., at 20, 76 S.Ct., at 591. we considered this more fully in *Draper v Washington*, supra, 372 U.S., at 495496, 83 S.Ct., at 779:

> "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.

, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." [Emphasis added.] *Mayer* at 92 S.Ct. 41492 S.Ct. 41511

A transcript of sufficient completeness must be provided necessary to assure that an indigent defendant receives as effective an appeal as a nonindigent defendant

> ".... where the grounds of appeal, as in this case, make out a **colorable need** for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative, will suffice for an effective appeal on those grounds." [Emphasis added.] *Mayer* at 92 S.Ct. 415

The Court concluded that a defendant could not be

> " ... denied a record of sufficient completeness to permit proper consideration of his claims. We repeat that this does not mean that he is automatically entitled to a full verbatim transcripts." *Mayer* at 92 S.Ct. 416

Clearly, in appeals where the question of sufficiency of the evidence is in question, the burden is on the State to show that less than a complete transcript of trial will suffice. The defendant though, may be required to show a "colorable need" for the portions of the transcript which are germane to the appeal. The showing of good cause by the defendant should by case law from the Court also pass Constitutional questions.

Such is the case in this matter. The State has asked nothing more than that an indigent defendant make a threshold showing in order to receive a copy of the voir dire transcript. If defendant has not been sentenced to non-parolable life, or has not challenged the jury array, or has not exhausted all peremptory challenges, so to automatically receive the transcript of the voir dire, then the defendant need only make a showing of good cause in order to

receive a copy.

In light of the facts in this matter and the cases presented it is clear that Mr. Bass' right to effective assistance of appellate counsel was not interfered with and that he was neither denied his right to due process or equal protection. This Court should grant plenary review of this significant question.

CONCLUSION

WHEREFORE, Petitioner prays that this court grant certiorari and reverse the decision of the Michigan Supreme Court which concluded the Michigan Court rule violated the Constitutional rights of indigent defendants and thereby modified the Court rule.

Respectfully submitted,

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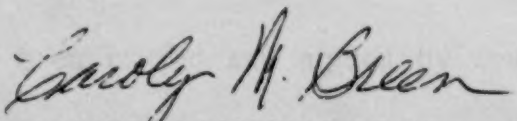
TIMOTHY A. BAUGHMAN
Chief of Research, Training
and Appeals



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APPENDIX A

ORDER
Entered: May 6, 1998

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

6 January 1998

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A, Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 109511
COA: 178342

JERRY LORENZO BASS,
Defendant-Appellee.

LC: 93-009499

_____/

On order of the Court, leave to appeal having been granted and this case having been briefed and argued by counsel, VACATED and leave to appeal is DENIED. Our order denying leave to appeal is based on the understanding that the Court of Appeals determined that the impediments of the court rule constitute state interference with appellate counsel's ability to provide effective assistance, *People v Mitchell*, 454 Mich 145, 154-155 (1997), and not on a finding that appellate counsel was ineffective for failing to comply with a minimum standard for

assigned counsel as such as a holding would be contrary to *People v Reed*, 449 Mich 375, 385-386 (1995). Therefore, we VACATE the decision of the Court of Appeals insofar as it may be read to conclude that compliance with the minimum standards for assigned appellate counsel is constitutionally required. The stay of the precedential effect of the Court of Appeals opinion imposed by the orders of June 19 and August 14, 1997 is VACATED.

Boyle, J., dessents and states as follows:

I dissent from the Court's order dismissing this appeal from its amendment (without notice) of MCR 6.524(F)(2)(a)(i) that deletes the requirement that good cause be shown for the preparation of a transcript of voir dire at public expense "unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause." The combined effect of these actions at a minimum (1) employs a standard for effective assistance of counsel that is not required by the supreme law of the land or that of this state; (2) repeals a court rule without notice that was adopted only four years ago after

publication, comment, and extensive study; (3) summarily implements court rule changes, despite our recent order announcing public hearings prior to amendment, see Administrative Order No. 1997-11[1] and (4) requires the taxpayers of local units of government to shoulder the burden of the costs of voir dire transcripts in all appeals, although they are not legally compelled to do so.

Other than an ambiguous reference to *People v Mitchell*, 454 Mich 145, 154 (1997), where we acknowledged the existence of a "prophylactic approach . . . applied to cases in which the court or the state directly interferes with the attorney-client relationship by preventing counsel from rendering assistance," the court offers

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[1] AO 1997-11 also provides for public comment after the fact if "immediate action is required":

> If no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment regarding whether the rule should be retained or amended.

There is not distinction in the order among rules amended by administrative procedure, by opinion of the court, or summarily by order.

no explanation for its apparent conclusion that the rule adopted four years ago on the recommendation of the Michigan Judges Associated is either unlawful or bad policy, or for its conclusion that there is a need for immediate action. To be sure, the Court guilty verdict in the face of overwhelming evidence of guilt. However, the taxpayers of local units of government are today made responsible for what the Michigan Trial Judges Association characterized as the substantial costs of transcribing all voir dire. Whether the reason for the Court's action is policy or law, further explanation is surely in order to avoid the implication that the Court is merely in order to avoid the implication that the Court is merely engaged in judicial activism. Const 1963, art 6, § 6.

It is clear that it has never been the law, either federally or in Michigan, that an indigent defendant is automatically entitled to transcripts of voir dire at public expense. The United States Supreme Court has held that a full transcript is not constitutionally required by either equal protection or due process. *Draper v Washington*, 372 US 487 (1963). This state has a proud history of providing services to indigents long before there was any

constitutional compulsion, but it has never been held that the state may not condition certain services on a showing of cause. That a wealthy defendant may employ investigators, for example, does not automatically entitle the indigent to publically paid investigators to locate witnesses any more than it automatically entitles payment for the production of out of State witnesses.

The equality principle as more recent explicated by the Supreme court puts fourth a three-factor test with the common theme of meaningful access to justice and an adequate opportunity to present claims, *Ake v Oklahoma,* 470 US 68 (1985), in other words, a classic balancing approach. See also *People v Loyer*, 169 Mich App 105, 126 (1988) (T.K. BOYLE, J., dissenting). Because the court's action today eschews consideration of these principles, it avoids balancing the magnitude of the risk to the indigent good-cause requirement, the governmental interest in economy, and the timely production of transcripts on appeal.[2] Indeed, even with

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[2] The defendant in the instant case did not challenge the array, exhaust his challenges, or attempt to show good cause. Defendant does not assert by affidavit that he attempted to obtain information from trial counsel regarding voir dire.

the transcripts having been provided to defendant Bass, it appears, as it did in virtually every case of the thousands we reviewed before the rule excluding automatic production of voir dire was adopted, that the voir dire did not contain a basis on which to posit a claim of error requiring reversal.

The Court provides no rationale for its reference to my discussion of the guiding principles for claims of ineffective assistance of counsel in *Mitchell, supra.* There, we recognized that "prejudice is presumed" in cases where "the circumstances . . . are so likely to prejudice the accused that the cost of at 154. Given that the United States Supreme Court rejected the assertion that full transcripts are constitutionally required by equal protection or due process in *Draper*, supra, the Court's intimation of such a requirement on the bases of the Sixth Amendment is inventive, but misguided and unacceptable in ultimate terms.

The cases we recognized in *Mitchell* as supportive of a categorical presumption of ineffective assistance all involved egregious official activity such that the state "impair[ed] the accused's enjoyment to the Sixth Amendment guarantee by

disabling counsel from representing him." *Id.* At 154, n 11 (emphasis added). The tenor of the Court's order implies that it views the court rule as disabling appellate counsel because appellate counsel may not be able to identify errors giving rise to a finding of good cause without first reviewing the transcript. However, as noted below, such inability is likely to be ruled good cause where defendant alleges by affidavit an inability to identify errors through cooperation with trial counsel, either because counsel is uncooperative or lacks sufficient recollection of the voir dire. Of course, where trial counsel recalls claims of appealable error, an affidavit to that effect would also likely establish good cause to the trial judge's satisfaction. Thus, the rule does not disable counsel; it merely creates a minimum procedural hurdle to establish entitlement to the voir dire transcript.

As described in *Mitchell*, each of the principle cases supporting the approach the majority weakly references as its authority for summary action here involved court orders or statutes that absolutely prevented counsel from conferring with their clients during trial recesses, from eliciting testimony from the defendant,

or from presenting a closing argument on the defendant's behalf. *Id.* These cases have nothing to do with implementing a minimal procedural burden to justify an expenditure of public funds. They involve absolute prohibitions on conduct critical to the defense.[3] Moreover, like the Supreme Court in *United States v Cronic*, 446 US 648, 667 (1984), this Court in *Mitchell* rejected extension of the categorical approach where "the claim is that counsel's preparation was inadequate." *Id.* At 154, n 11.

The Court's reference to *Mitchell* here is fallacious for two easily identified reasons: First, defendant's claim that the court rule deprives him of his Sixth Amendment right to the effective assistance of counsel, like Mitchell's claim that counsel's thirty-day suspension before trial denied him the same, boils down to a claim that counsel was presumptively unable to prepare an appeal (Bass) or defense (Mitchell). Because we rejected the categorical

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[3] In order for a case to fall into the categorical approach, it must involve "a structural defect which defies harmless error analysis and requires automatic reversal." *Jones v Vacco,* 126 F3d 408, 416 (CA 2, 1997). That is not the case here

approach to such claims in *Mitchell*, the Court's reliance thereon in this case is misplaced. Second, and more fundamentally, the categorical approach is inapplicable where, as here, the case involves a mere procedural threshold, not a prohibitive rule that infects the case by effecting an absolute ban on some task crucial to counsel's ability to effectively advocate his client's interest.[4]

Nearly four years have passed since the amendments of the rule. Presumably, today's action is explained by changes in the membership of this court or a change of mind on the part of a justice or justices. It may be that the administrative burden regarding augmentation of the record at the trial court level does not justify the limited good-cause showing as a matter of policy. See *People v Shambatuyev*, 50 Cal App 4th 267 (1996). It may be

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[4] The Court's reference to *Mitchell* could also be interpreted as a reference to "the rare cases in which the circumstances are such that 'although counsel is available to assist the accused . . ., the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate . . . .'" *Id.* At 155. However, a procedural burden as a condition on publicly subsidize transcript preparation is not a "circumstance . . . of such 'magnitude' . . .[that] an 'actual breakdown of the adversarial process'" occurs by virtue of its existence. *Id.*

that other experience in applying the rule demonstrates that the rule needs modification, such s a provision requiring a clerk to make the Court needs to direct its attention to the responsibility of trial counsel to cooperate with appellate counsel as part of trial counsel's obligation to the client. In all events, it would seem that if reports of trial counsels' obligation to the client. In all events, it would seem that if reports of trial counsels' lack of cooperation are a problem, an affidavit to that effect would be "good cause."

On the other hand, it may be that a majority of the Court has now simply opted for the line of least resistance and accepted the view that the minimal procedural burden of alleging good cause for the voir dire transcripts is too onerous to impose on assigned appellate counsel. My point is only that there should be some justification in law or policy for this "about face" as a matter of self discipline, if not as a matter of loss of face. Since it has not and cannot be demonstrated that the result is legally required, the Headlee Amendment, Const 1963, art 9, § 29, might suggest that, because this Court requires transcriptions as a matter of policy, "any necessary increased costs" incident to the automatic provision

of voir dire transcripts should be borne by the Court rather than funding units supported by local taxpayers.

I dissent from both actions taken today.

Weaver, J., joins in the dissenting statement of Justice Boyle.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 6, 1998 Corbin R. Davis
Clerk

APPENDIX A

ORDER
Entered: May 6, 1998

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

89-35

Amendments to Rules 6.645(F), 6.433, and 7.210(B) of the Michigan Court Rules

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

On order of the Court, the need for immediate action having been found, the notice requirements of MCR 1.201 are dispensed with, and the following amendments to Rules 6.425(F), 6.433, and 7.210(B) of the Michigan Court Rules are adopted, effective immediately.

[The present language is repealed and replaced by the following language unless otherwise indicated below.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A) - (E) [Unchanged.]

(F) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) [Unchanged.]

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court report to prepare and file, within the time limits specified in MCR 7.210.,

(i) the trial or plea proceeding ~~transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of a parole, or shows good cause,~~

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor,

the defendant and the appointed lawyer, the Court reporter, and the Michigan Appellate Assigned Counsel System.

(3) [Unchanged.]

STAFF COMMENT: The May 6, 1998 amendment of subrule (F)(2)(a)(i) removed the limitations on transcription of the jury voir dire that took effect July 1, 1994.

Rule 6.433 Documents for Postconviction Proceedings; Indigent Defendant

(A) - (C) [Unchanged.]

(D) ~~Transcript of Jury Voir Dire. The court shall not order the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, of shows good cause.~~

STAFF COMMENT: The May 6, 1998 deletion of subrule (D) removed the limitations on transcription of the jury voir dire that took effect July 1, 1994.

Rule 7.210 Record on Appeal

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 6.235(F)(2) ~~or MCR 6.433~~, or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b) - (e) [Unchanged.]

(2) - (3) [Unchanged.]

(C) - (J) [Unchanged.]

STAFF COMMENT: The May 6, 1998 amendment of subrule (B)(1)(a) coincided with the removal from Rule 6.433 of limitations on the transcription of the jury voir dire.

Justice Boyle states:

I dissent from the court's order dismissing the appeal in *People v Bass* (Docket No. 109511) and from its amendment (without notice) of MCR 6.425(F)(2)(a)(i) that deletes the transcript of voir dire at public expense "unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the

possibility of parole, or shows good cause." The combined effect of these actions, at a minimum (1) employs a standard for effective assistance of counsel that is not required by the supreme law of the land or that of this state; (2) repeals a court rule without notice that was adopted only four years ago after publication, comment, and extensive study; (3) summarily implements court rule changes, despite our recent order announcing public hearings prior to amendment; see Administrative Order No. 1997-11,

[1]and (4) requires the taxpayers of local units of government to shoulder the burden of the costs of voir dire transcripts in all appeals, although they are not legally compelled to do so.

Other than an ambiguous reference to *People v Mitchell*, 454

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[1]AO 1997-11 also provides for public comment after the fact if "immediate action is required":

> If no public hearing has been held before a rule is adopted or amended, the matter will be placed on the agenda of the next public hearing, at which time the Supreme Court will hear public comment regarding whether the rule should be retained or amended.

There is not distinction in the order among rules amended by administrative procedure, by opinion of the court, or summarily by order.

Mich 145, 154-155; 560 NW2d 600 (1997), where we acknowledged the existence of a "prophylactic approach... applied to cases in which the court or the stat directly interferes with the attorney-client relationship by preventing counsel from rendering assistance," the curt offers no explanation for its apparent conclusion that the rule adopted four years ago on the recommendation of the Michigan Judges Association is either unlawful or bad policy, or for its conclusion that there is a need for immediate action. To be sure, the Court may take such action in the same sense that a jury may return a not guilty verdict in the face of overwhelming evidence of guilt. However, the taxpayers of local units of government are today made responsible for what the Michigan Trial Judges Association characterized as the substantial costs of transcribing all voir dire. Whether the reason for the Court's action is policy or law, further explanation is surely in order to avoid the implication that the Court is merely engaged in judicial activism. Const. 1963, art 6, § 6.

It is clear that it has never been the law, either federally or in Michigan, that an indigent defendant is automatically entitled to transcripts of voir dire at public expense, The Untied States Supreme

Court has held that a full transcript is not constitutionally required by either equal protection or due process. *Draper v Washington,* 372 US 487 (1963). This state has a proud history of providing services to indigents long before there was any constitutional compulsion, but it has never been held that the state may not condition may employ investigators, for example, does not automatically entitle the indigent to publically paid investigators to locate witnesses any more than it automatically entitles payment for the reproduction of out of state witnesses.

The equality principle as more recent explicated by the Supreme Court puts forth a three-factor test with the common theme of meaningful access to justice and an adequate opportunity to present claims, *Ake v Oklahoma,* 470 US 68 (1985), in other words, a classic balance approach. See also *People v Loyer*, 169 Mich App 105, 126 (1988) (T.K. BOYLE, J., dissenting). Because the Court's action today eschews consideration of these principles, it avoids balancing the magnitude of the risk to the indigent defendant or the adversary process, the utility of the economy, and the timely

production of transcripts on appeal.

[2]Indeed, even with the transcripts having been provided to defendant Bass, it appears, as it did in virtually every case of the thousands we reviewed before the rule excluding automatic production of voir dire was adopted, that the voir dire did not contain a basis on which to posit a claim of error requiring reversal.

The Court provides no rational for its reference to my discussion of the guiding principles for claims of ineffective assistance of counsel in *Mitchell*, supra. There, we recognized that "prejudice is presumed" in cases where "the circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. At 154. Given that the United States Supreme Court rejected the assertion that full transcripts are constitutionally required by equal protection or due process in *Draper, supra*, the Court's intimation of such a requirement on the basis of the Sixth Amendment is inventive, but

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[2]The defendant in the instant case did not challenge the array, exhaust his challenges, or attempt to show good cause. Defendant does not assert by affidavit that he attempted to obtain information from trial counsel regarding voir dire.

misguided and unacceptable in ultimate terms.

The cases we recognized in *Mitchell* as supportive of a categorical presumption of ineffective assistance all involved egregious official activity such that the state "impair[ed] the accused's enjoyment of the Sixth Amendment guarantee by disabling counsel from representing him." *Id.* At 154, n 11 (emphasis added). The tenor of the court's order implies that it views the court rule as disabling appellate counsel because appellate counsel may not be able to identify errors giving rise to a finding of good cause without first reviewing the transcript. However, as noted below, such inability is likely to be ruled good cause where defendant alleges by affidavit an inability to identify errors through cooperation with trial counsel, either because counsel is uncooperative or lacks sufficient recollection of the voir dire. Of course, where trial counsel recalls claims likely establish good cause to the trial judge's satisfaction. Thus, the rule does not *disable* counsel; it merely creates a minimal procedural hurdle to establish entitlement to the voire dire transcript.

As described in *Mitchell*, each of the principie cases

supporting the approach the majority weakly references as its authority for summary action where involved court orders or statutes that absolutely prevented counsel from conferring with their clients during trial recesses, from eliciting testimony from the defendant's behalf. Id. These cases have nothing to do with implementing a minimal procedural burden to justify an expenditure of public funds. They involve absolute prohibitions on conduct critical to the defense.

[3] Moreover, like the supreme Court in *United States v Cronic*, 466 US 648, 667; 104 S Ct 2039; 80 L Ed 2d 657 (1984), this Court in *Mitchell* rejected extension of the categorical approach where "the claim is that counsel's preparation was inadequate." *Id.* At 154, n 11.

The Court's reference to Mitchell here is fallacious for two easily identified reasons: First, defendant's claim that the court rule deprives him of his Sixth Amendment right to the effective assistance of counsel, like Mitchell's claim that counsel's thirty-day

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[3]In order for a case to fall into the categorical approach, it must involve "a structural defect which defies harmless error analysis and requires automatic reversal." *Jones v Vacco*, 126 F3d 408, 416 (CA 2, 1997). Such is not the case here.

suspension before trial denied him the same, boils down to a claim that counsel was presumptively unable to prepare an appeal (Bass) or defense (Mitchell). Because we rejected the categorical approach to such claims in *Mitchell*, the Court's reliance thereon in this case is misplaced. Second, and more fundamentally, the categorical approach is inapplicable where, as here, the case involves a mere procedural threshold, not a prohibitive rule that infects the case by effecting an absolute ban on some task crucial to counsel's ability to effectively advocate his client's interest.

[4]Nearly four years have passes since the amendment of the rule. Presumably, today's action is explained by changes in the membership of this Court or a change of mind on the part of a justice or justices. It may be that the administrative burden

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[4]The Court's reference to *Mitchell* could also be interpreted as a reference to "the rare cases in which the circumstances are such that 'although counsel is available to assist the accused . . ., the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate . . . .'" *Id.* At 155. However, a procedural burden as a condition on publicly subsidize transcript preparation is not a "circumstance . . . of such 'magnitude' . . .[that] an 'actual breakdown of the adversarial process'" occurs by virtue of its existence. *Id.*

regarding augmentation of the record at the trial court level does not justify the limited good-cause showing as a matter of policy. See *People v Shambatuyev*, 50 Cal App 4th 267(1996). It may be that other experience in applying the rule demonstrate that the rule needs modification, such as a provision requiring challenges. It may be that the Court needs to direct it attention to the responsibility of trial counsel to cooperate with appellate counsel as part of trial counsel's obligation to the client. In all events, it would seem that if reports of trial counsels' lack of cooperation are a problem, an affidavit to that effect would be "good cause."

On the other hand, it may be that a majority of the Court has now simply opted for the line of least resistance and accepted the view that the minimal procedural burden of alleging good cause for the voir dire transcripts is too onerous to impose on assigned appellate counsel. My point is only that there should be some justification in law or policy for this "about face" as a matter of self discipline, if not as a matter of loss of face. Since it has not and cannot be demonstrated that the result is legally required, the Headlee Amendment, Const 1963, transcriptions as a matter of

policy, "any necessary increased costs" incident to the automatic provision of voir dire transcripts should be borne by the Court rather than funding units supported by local taxpayers.

I dissent from both actions taken today.

Weaver, J., joins in the dissenting statement of Justice Boyle.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 6, 1998 Corbin R. Davis
Clerk

APPENDIX B

ORDER
Entered: August 4, 1997
109511 & (75)

Michigan Supreme Court
Lansing, Michigan
Conrad L. Mallett, Jr.
Chief Justice
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A, Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 109511
COA: 178342
LC: 93-009499

JERRY LORENZO BASS,
Defendant-Appellee.

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On order of the court, the motion for reconsideration of this court's order of June 19, 1997, is considered, and it is DENIED because it does not appear that the order was entered erroneously.

The order of June 19, 1997, remains in effect and, shall be treated as also staying the precedential effect of the July 25, 1997 judgment of the Court of Appeals, on rehearing, insofar as it held that indigent criminal defendants are entitled to a transcript of the jury voir dire without satisfying the requirements of MCR 6.425(F)(2)(a)(i).

On further order of the Court, the application for leave to

appeal is GRANTED.

Cavanagh and Kelly, JJ., would grant the motion to reconsider the stay and would lift the say.

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I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 6, 1998 Corbin R. Davis

Clerk

APPENDIX C
STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, FOR PUBLICATION
July 25, 1997
9:10 a.m.

v

JERRY BASS, No. 178342
Defendant-Appellant. Recorder's Court
LC No. 93-009499
ON REHEARING

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of delivery of less than fifty grams of cocaine, MCL 333.7401(1)(2)(a)(iv), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Pursuant to an agreement with the prosecutor, defendant pleaded guilty of being an habitual offender, second offense, MCL 769:10; MSA 28.1082, and a charge of habitual offender, fourth offense, was dismissed. Defendant was sentenced to eight to twenty years' imprisonment for each of his cocaine convictions. Those sentences were vacated and defendant was sentenced to twelve to thirty years' for habitual

offender, second offense. Defendant appeals as of right. We remand.

On December 12, 1993, at approximately 4:30 p.m., Detroit police officers were conducting an undercover "buy and bust" narcotics operation near Cass and West Alexandrine in the City of Detroit. Officer Carl Moore drove to an area in an unmarked car with this partner, Officer Ronald Finnely. The Officers saw defendant and Perry Scott, the codefendant,[1] on the corner of Cass and West Alexandrine. According to the officers, Scott was "Flagging" down passing motorist. Officer Moore got out of the car and approached Scott, who was standing within six feet of defendant. Officer Moore inquired whether Scott had any cocaine for sale, and tendered $20 as prepayment for two "rocks" of cocaine. Scott, in turn, passed the money to defendant, who gave him the cocaine. Scott handed the cocaine to Officer Moore, who then walked back to the car. As Officer Moore approached the car, Officer Finnely observed a white car stop at the corner and defendant hand something to its occupants. Officers Moore and Finnely radioed other officers who were waiting nearby and

provided them with descriptions of defendant and Scott so they could make arrests.

Upon receiving descriptions of defendant and Scott, Lieutenant James Lashbrook and Officer Andrew Gammichia drove an unmarked van to the corner, where they were met by Officers Kevin Robinson and Dennis Griffith in a marked patrol car. As they approached, they saw defendant walking away from the corner. Officers Griffith and Gammichia observed defendant discarding packages of suspected cocaine. While Lieutenant Lashbrook collected the discarded packets, Officer Gammichia arrested defendant. Scott was also arrested. The substances sold to Officer Moore and discarded by defendant were tested and found to contain cocaine.

Lieutenant Lashbrook and Officer Robinson departed within minutes of defendant's arrest and proceeded to the corner of Cass and Selden, where the white car had stopped. As Officer Robinson approached the car, he noticed a gun in the console area and several small envelopes that he suspected contained drugs on the floor. The officers arrested the occupants of the car, Leland Simms and Patrick

Mitchell. One of the men possessed the $20 dollar bill used by Officer Moore to purchase the cocain. This ended the officers' versions of the December 12, 1993, events.

Defendant testified on his own behalf and gave a different account of the events that transpired. According to defendant, he was in the area of Cass and Alexandrine with Patrick Mitchell to search for a place to live. After giving change to a man on the street, he entered the Huntington Hotel to inspect a room that was for rent. Finding the room unsatisfactory, defendant prepared to leave the hotel. Defendant was walking toward the hotel doors when a stranger said that the police was outside. Upon leaving the building, defendant parted company with Mitchell.

Defendant testified that, once outside the hotel, Officer Robinson repeatedly slammed him into a tree, causing a laceration on his head. According to defendant, Officer Gammichia told Officer Robinson that they had messed up. Defendant added that, during the ride to the precinct, Lieutenant Lashbrook inquired whether they could "square it" by releasing him. Defendant claimed that he was bleeding profusely during the ride to the station and

indicated that he was later taken to Detroit Receiving Hospital for treatment. Although medical records confirmed that defendant was treated in the hospital, a photograph of him taken shortly after he arrived at the precinct merely revealed, in defendant's words, "speckles" or "spots" of blood on his white shirt. Defendant claimed that the photo was altered.

Defendant first argues that he was denied a fair trial by improper remarks by the prosecutor during closing argument. Improper prosecutorial remarks are grounds for reversal where they deny the defendant a fair and impartial trial. *People v Bahoda*, 448 Mich, 261, 266-267; 531 NW2d 659 (1995); *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997). Defendant did not, however, object to any of the remarks he now claims were improper. Appellate review of prosecutorial remarks is generally precluded absent an objection because the trial court was deprived of an opportunity to cure the error. *Id.* Reversal is warranted in the absence of an objection if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id.*

Defendant initially contends that the prosecutor shifted the burden of proof when he argued that the jury should decide whether to believe defendant or the prosecution witnesses and return a verdict consistent with that determination. We disagree. The prosecutor stated, in relevant part:

> There really is no room for innocent mistake, I don't believe, looking at the evidence of the case. Either the police officers are lying about this man selling dope or this man is lying about being in the area looking for a hotel room and doing nothing and getting his [sic] banged into the tree. I don't think the evidence shows anything else.
>
> As we talked abut before, and I'm going to talk about now, a criminal case boils down to one thing, reason and common sense. Reason and common sense. That's going to tell you who to believe. That's going to tell you who not to believe. That's going to tell you whether the man's guilty or not guilty.
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> * * *
>
> If [defendant's) testimony makes sense, those police officers are lying. No other way about it. If the police officers are telling the truth, he's lying.

A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because this argument tends to shift the burden of proof. *People v Foster,* 175 Mich App 311, 317; 437 Mich 395 (1989), disapproved on other grounds in *People v Fields,*

450 Mich 94, 115, n 24; 538 NW2d 356 (1995). A prosecutor may, however, argue that the defendant or another witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

In support of his claim of prosecutorial misconduct, defendant relies on *United States v Richter*, 826 F2d 206 (CA 2, 1987). In *Richter*, the court found that, during cross-examination, the prosecutor's questions compelled the defendant to state that an FBI agent was lying when he testified in a way that conflicted with the defendant's testimony. *Id* at 208. The court stated "[d]eterminations of credibility are for the jury . . . not for witnesses . . . [and therefore] [p]rosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper." *Id* at 208 (citations omitted). The court concluded that reversal was required because the prosecutor compounded the error by calling a rebuttal witness to bolster the FBI agent's credibility and remarking in closing argument that if the defendant was innocent, the FBI agents were lying and committed perjury. *Id.* at 208-209. The court further noted that the prosecutor

misstated the law when he remarked that if the agents were telling the truth, the defendant was guilty. *Id.* at 209.

In reviewing subsequent cases, it becomes readily apparent that the Second Circuit Court of Appeals has been reluctant to expand its decision in *Richter* beyond the narrow and specific facts of that case. *United States v Gaind,* 31 F3d 73 (CA 2, 1994); *United States v Weiss,* 930 F2d 185 (CA 2, 1991), cert den 502 US 842; 112 S Ct 133; 116 L Ed 2d 100 *(1991); United States v Durrani,* 835 F2d 410 (CA 2, 1987). The statement in *Gaind, supra* at 77, that relief will not be warranted unless the defendant can demonstrate the same "starkly offensive prosecutorial delinquencies" found in *Richter,* essentially limits *Richter* to its facts.

In any event, unlike *Richter, supra,* defendant's argument is premised exclusively on improper comments during closing argument. Other federal courts have considered this issue with varying results. In *United States v Vargas,* 583 F2d 380, 386-387 (CA 7, 1978), the Seventh Circuit Court of Appeals held that the prosecutor's equating of a not guilty verdict with a finding that government agents were lying and a guilty verdict with their telling

the truth was improper because it distorted the burden of proof by suggesting what the jury must find to reach a verdict. The court reasoned that, even assuming that there were unavoidable contradictions in the respective testimony, it did not follow that, in order to acquit, the jury must believe that the government agents lied. The court indicated that credibility determinations are but one factor in determining whether evidence was sufficient. In effect, the prosecutor's comments left no room for the jury to "return a verdict of not guilty because the evidence might not be sufficient to convict defendant beyond reasonable doubt." *Id* at 387.

In cases decided after *Vargas*, courts have concluded that similar remarks did not necessitate reversal. For example, in *United States v Diaz-Carreon*, 915 F2d 951, 956 (CA 5, 1990), the Fifth Circuit Court of Appeals agreed with the *Vargas* court that error occurs when a prosecutor argues that an acquittal requires its witnesses to be disbelieved and the defense witnesses to be believed. The Fifth Circuit Court of Appeals, however, distinguished *Vargas by* considering the argument in context to determine the prejudicial effect of the comment. *Id.* at 957. The *Diaz-Carreon* prosecutor

stated that the jury would either believe the defendant and not everyone else, or believe the other witnesses and not the defendant. *Id.* at 956. The court noted that the prosecutor's comments followed defense counsel's attack on the credibility of the prosecution witnesses and properly stressed that witness credibility was a crucial issue in the case. The court held that the comments were permissible because the prosecutor never informed the jurors of what they must find to reach a verdict. In so holding, the court emphasized that the prosecutor merely intended to inform the jurors that they were likely to believe one side's witnesses or that the government witnesses were the most believable. *Id.* at 957.

Also, in *United Stated v Marshall,* 75 F3d 1097 (CA 7, 1996), the Seventh Circuit Court of Appeals held that the prosecutor's comments did not deny the defendant a fair trial. The court noted that the prosecutor did not present the jury with "stark, bright-line, and absolute alternatives that might serve to distort the burden of proof " *Id* at 1108. Rather, the prosecutor stated that the jury should find the defendant not guilty if it believed the government agent was lying, but did not exclude other ways of reaching the same

conclusion. *Id.*

In the instant case, the conduct of the prosecutor was not identical to the "starkly offensive" conduct of the prosecutors in *Richter, supra, or Vargas, supra.* The statements made during closing argument did not expressly state that a verdict for the defendant would require a finding that all of the government's witnesses were lying. The prosecutor focused on the credibility issue and repeatedly noted that because the testimony could not be reconciled, either the police officers or defendant was lying. The prosecutor did not inform the jurors of what they must find to convict or acquit. Nor did the prosecutor exclude other ways to reach a verdict. We therefore conclude that the prosecutor's remarks do not require reversal.

Defendant also contends that the prosecutor made an improper civic-duty argument when he urged the jury to "do the right thing" and "do justice." The prosecutor remarked as follows:

> Ladies and gentlemen, when you're deciding this case, you're not supposed to decide upon whether you like this man, whether you feel sorry for this man or whether you hate this man. It has nothing to do with this case. *This case is about doing the right thing. About looking at the evidence. About*

deciding what evidence to believe. About trying to do justice. About trying to do justice. [Emphasis added.]

Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *Bahoda, supra* at 282. Prosecutors, however, should not resort to civic duty arguments that appeal to the fears and prejudices of jurors. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. *Id.*

Having reviewed the remarks in context, we conclude that they did not deny defendant a fair and impartial trial. The remarks "do justice" and "do the right thing" occurred at the end of a lengthy discussion of the evidence and were followed by further comments on the evidence. The remarks were isolated, and the prosecutor's argument was otherwise proper.[2] Moreover, an objection and curative instruction could have eliminated any prejudicial effect. *Messenger, supra.*

Defendant also raises several claims of ineffective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v*

Effinger, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant argues that he was denied the effective assistance of counsel by trial counsel's failure to object during the prosecutor's closing argument. As discussed previously, defendant was not denied a fair and impartial trial by the prosecutor's conduct. Therefore, defense counsel's failure to object to those remarks did not affect the outcome of the trial.

Defendant also argues that trial counsel was ineffective for failing to obtain the transcript of Scott's trial in order to use the police officers' prior testimony for impeachment purposes, and for failing to call Scott and Mitchell as witnesses at defendant's trial.

Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense, *People v Hoyt*, 185 Mich App

531, 537-538; 462 NW2d 793 (1990); *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988); *People v Wilson*, 159 Mich App 345, 354; 406 NW2d 294 (1987). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy. *Julian, supra.* In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 640, 642-1 459 NW2d 80 (1990). This Court will not second-guess defense counsel's trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In support of his claim that trial counsel should have had a transcript of Scott's trial prepared so that the police officers' testimony could be used for impeachment purposes, defendant cites two instances where the testimony was potentially inconsistent. The

first instance occurred when Officer Moore testified at Scott's trial that he saw a car stop in response to Scott's motioning, while Officer Finnely testified that he did not see a car stop. The witnesses, however, did not testify with respect to this issue at defendant's trial. The second instance occurred when Officer Moore testified at Scott's trial that Officer Finnely provided a description of the suspects to an arrest team, but at defendant's trial, he testified that he provided the description.

Having reviewed the testimony, we find that this claim is without merit. Contrary to defendant's assertion Scott was not acquitted on the basis of inconsistencies in the officers' testimony. While the court that tried Scott noted an inconsistency in the testimony, it ultimately found Scott not guilty because it questioned whether he was involved in the drug deal. Given the police officers' firm identification testimony and evidence that cocaine was discarded by defendant, we find that trial counsel's failure to impeach other portions of their testimony did not deprive defendant of the effective assistance of counsel where knowledge by the jury of the minor discrepancies in the officers' testimony would not have

affected the outcome of the trial.

Defendant also asserts that trial counsel should have called Scott and Mitchell as witnesses at his trial. Here, trial counsel was appointed to represent defendant at his trial and during his testimony at Scott's trial. At Scott's trial, Mitchell's testimony paralleled that provided by defendant. Mitchell testified that he and defendant rode on the bus to the area of Cass and Alexandrine and looked for a hotel room. After leaving the hotel, they walked in different directions. Mitchell obtained a ride from Simms and was arrested when the police found his heroin after stopping the car in which he was the passenger. Scott testified that he did not know defendant, did not see anyone selling drugs, and was not himself selling drugs. He also stated that he was slammed against a wall and arrested by the police officers who got out of the van.

Trial counsel was present for defendant's testimony on December 17, 1993, but was not present when Scott and Mitchell testified on December 22, 1993. Trial counsel, nevertheless, was aware that Scott and Mitchell were potential witnesses because defendant testified at Scott's trial. Had the witnesses testified at defendant's

trial, they may have aided in his defense because Mitchell would have corroborated defendant's testimony and Scott would have confirmed that he had no connection with defendant. Given the conflicting version of events presented by the officers and defendant, the additional testimony in support of defendant's story may well have made a difference in the outcome at trial. However, because the decision to call witnesses is a matter of trial strategy, we cannot determine on the basis of the record before us whether trial counsel had a reason for not calling these witnesses. We therefore remand for an evidentiary hearing at which trial counsel can explain her reasons for not calling the witnesses. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant further argues that he is entitled to receive a transcript of the jury voir dire because the denial of a transcript violates his right to equal protection and to the effective assistance of counsel. Although defendant failed to raise this issue below, we will consider it because it involves a constitutional issue. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). Constitutional issues are reviewed de novo on appeal. *People v Houstina*, 216 Mich App

70, 73; 549 NW2d 11 (1996).

Defendant first contends that the court rules restricting the ability of an indigent defendant to obtain a transcript of a voir dire proceeding are unconstitutional. MCR 6.425 (F)(2)(a)(i) directs that in the order appointing a lawyer for an indigent defendant, the trial court must direct the court reporter to prepare and file

> the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause.

Under MCR 6.433(A), an indigent defendant may request transcripts, and the court must order the preparation of transcripts unless they have already been ordered pursuant to MCR 6.425(F)(2). However, consistent with MCR 6.425, MCR 6.433(D) provides that

> [t]he court shall not order the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause.

Defendant argues that the requirement that he demonstrate good cause for the transcript violates his right to equal protection and the

effective assistance of counsel.

In Griffin v Illinois, 351 US 12, 17-19; 76 S Ct 585; 100 L Ed 891 (1956), the Supreme Court held that, to satisfy the commands of the Equal Protection Clause, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights. *Id.* at 19. *Griffin* and its progeny command that a state must "provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v North Carolina*, 404 US 226, 227; 92 S Ct 431; 30 L Ed 2d 400 (1971). In the context of providing transcripts to indigent defendants, the Supreme Court explained in *Britt:*

> In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. [Id.]

In *Draper v Washington*, 372 US 487, 497; 83 S Ct 774; 9 L Ed 2d 899 (1963), the Supreme Court explained that it is only necessary that the state furnish a "record of sufficient completeness" for adequate consideration of defendant's claims of error. In *Mayer v*

Chicago, 404 US 189, 195; 92 S Ct 410; 30 L Ed 2d 372 (1971), the Supreme Court held that, while a full transcript is not automatically required, once an indigent defendant makes out "a colorable need for a complete transcript," the burden is on the State to show that a portion of the transcript or an "alternative" will suffice. See, also, *United States v Devlin*, 13 F3d 1361, 1363-1364 (CA 9, 1994).

In this case, we find that defendant has made no effort to demonstrate either a "colorable need" or "good cause" for a transcript of the voir dire proceedings. Under identical circumstances, the courts of other jurisdictions have generally held that *Griffin* and its progeny do not require the production of the voir dire transcript because it is not necessary to review the issues raised on appeal. See *Johnson v Arkansas*, 258 Ark 560; 528 SW2d 367 (1975); *Goins v Meade*, 528 SW2d 680, 681-684 (Ky, 1975), cert den 424 US 972; 96 S Ct 1474; 47 L Ed 2d 741 (1976); *State v Robinson*, 302 So 2d 270, 272 (La, 1974); *Green v Tennessee*, 1 Tenn Crim App 719, 721-724; 450 SW2d 27 (1969). See also *People v Hill*, 67 Cal 2d 105; 60 Cal Rptr 234; 429 P2d 586 (1967), cert den 389 US 1009; 88 S Ct 572; 19 L Ed 2d 607 (1967). The

Supreme Court of Ohio, however, reached the opposite result in *State ex rel Seigler v Rone*, 42 Ohio St 2d 361; 328 NE2d 811 (1975).

Like the majority of courts that have considered this issue, we conclude that defendant's constitutional right to equal protection does not entitle him to the production of a transcript of the voir dire proceedings. Pursuant to *Draper, supra*, the state is only required to provide transcripts of the portion of the proceedings germane to consideration of the issues raised on appeal. Here, defendant raises no issue on appeal that requires review of the voir dire transcript. We therefore conclude that the court rules governing the production of the voir dire transcript do not violate defendant's right to equal protection.

More troubling, however, is defendant's argument that MCR 6.425 is unconstitutional because it violates his right to effective assistance of counsel. Where a state grants criminal defendants an appeal as of right, it must also provide indigent defendants with an attorney to represent them on appeal. *Douglas v California*, 372 US 353, 358; 83 S Ct 814; 9 L Ed 2d 811 (1963). Under the Due

Process Clause of the Fourteenth amendment, a criminal defendant is entitled to the effective assistance of counsel in his first appeal of right. *Evitts v Lucey*, 469 US 387, 396; 105 S Ct 830; 83 L Ed 2d 821 (1985).

The Michigan Legislature established the Appellate Defender Commission and assigned it the responsibility of developing a system of indigent appellate defense services. MCL 780.712; MSA 28.1114(102), MCL 780.713; MSA 28.1114(103). The commission's regulations for the appointment of appellate counsel for indigent defendants and minimum standards for services provided by appointed counsel were approved by the Michigan Supreme Court in 1981. Administrative Order No. 1981-7, 412 Mich lxv (1981). The Court affirmed its order in 1985. Administrative Order No. 1985-3, 421 Mich lxvii (1985). Pursuant to the standards and directives of appellate counsel, counsel must request and review *all* transcripts and lower court records and assert meritorious claims based on the lower court record.

In *Hardy v United States*, 375 US 277; 84 S Ct 424; 11 L Ed 2d 331 (1964), the Court held that, in the federal system, where a

defendant has an appeal of right and Congress has enacted statutes to buttress that right, the entire transcript must be produced when appointed appellate counsel did not serve as trial counsel. The Court reasoned as follows:

> *But when, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not he discharged if he is allowed less than that.* For Rule 52 (b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The right to notice "plain errors or defects" is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended. [Id- at 280 (emphasis added).]

The *Hardy* Court held that, under the circumstances of the case, the defendant was entitled to transcripts of the court's charge to the jury and the testimony presented by the prosecution and the defense. Id. at 282. The Court relied on federal law and explicitly declined to consider whether a complete transcript was constitutionally required. *Id.*

We find that the remarks of the *Hardy* Court are equally applicable to the circumstances of this case. The standards for

appointed appellate counsel require that counsel assert claims of error that are supported by the record and possess arguable legal merit. In order to faithfully discharge the duties imposed by the Appellate Defender Commission and the Supreme Court, counsel must have access to transcripts of all the proceedings so that all issues of legal merit can be raised. Although appellate counsel could contact trial counsel and inquire about voir dire, information obtained from trial counsel is not a substitute for a transcript because trial counsel's memory may be faulty, trial counsel may not be aware that an error occurred during voir dire, *id.* at 280, n 3, or trial counsel may be the target of the defendant's claim of error. We therefore conclude that a transcript of voir dire must be provided in all cases where appointed appellate counsel was not the indigent defendant's trial counsel. Accordingly, in this case, we find that defendant is entitled to a transcript of the voir dire testimony, to determine if any justifiable claims of error occurred during the voir dire.

Defendant also argues that his twelve-to thirty-year sentence for habitual offender, second offense, is disproportionate. We disagree.

This Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality. People *v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The principle of proportionality requires that the sentence imposed be proportionate -to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We find that defendant's twelve-to thirty-year sentence is proportionate. Contrary to defendant's contention, his twelve prior felony convictions, even if property offenses, place him among more serious offenders. As the trial court aptly noted when sentencing defendant, defendant clearly does not intend to live by the rules of society. Given defendant's lengthy criminal record and his conviction of delivery of cocaine offenses, defendant's twelve-to thirty-year sentence is proportionate to the offense and the offender.

To the extent that defendant argues that he is entitled to be resentenced because the trial court misapplied or misunderstood the law when it determined that the habitual offender statute increased

the upper end of the guidelines range by fifty percent, this challenge does not state a cognizable claim for relief. The Michigan Supreme Court recently recognized that "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) *the sentence is disproportionate." Id.* at 177 (emphasis added). We conclude that defendant's sentence is proportionate and that *Mitchell* therefore precludes this claim.

Defendant also claims that he is entitled to a new trial based on newly discovered evidence. Defendant relies on an inter-office police memorandum that defendant obtained after his conviction, wherein two officers acknowledged that defendant had sustained a "minor" or "small" cut on his right ear and that defendant should be taken to the hospital. At trial, one officer in question testified that he did riot "recall" an injury to defendant's head. When questioned

regarding whether officers were instructed to take defendant to the hospital, a second officer responded "I don't believe so." When asked, " [a]re you aware of a visit to the Detroit Receiving Hospital by [defendant]," the officer replied, "I do not have that information.

Before a new trial is warranted, a defendant must demonstrate that the evidence itself, not merely its materiality (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977); *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). Newly discovered evidence is not grounds for a new trial where it would merely be used for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993); *People v Stricklin*, 162 Mich App 623, 631-632; 413 NW2d 457 (1987). Correspondingly, newly discovered evidence which relates only to a witness' credibility is not sufficient to require a new trial. *People v McWhorter*, 150 Mich App 826, 835; 389 NW2d 499 (1986); *People v Boynton*, 46 Mich App 748, 750; 208 NW2d 523 (1973).

The appellant has the burden of showing that the evidence is both newly-discovered and material. *People v Van Camp*, 356 Mich 593, 602; 97 NW2d 726 (1959); *People v Williams*, 118 Mich App 266, 271; 324 NW2d 599 (1982).

We have examined the record and conclude that defendant has not met his burden. There has been no showing that this evidence was not available and could not have been discovered and produced had defendant exercised reasonable due diligence at the time of trial. Defendant does not allege that the police department, prosecution, or other entity withheld the memorandum from discovery. Rather, defendant simply claims that he "did not know until long after trial that an internal police memorandum even existed." As there is no explanation for defendant's failure to take any reasonable action at the time of trial, no relief is justified. Of more importance, we are not convinced that the memorandum, acknowledging that defendant, in fact, did sustain a *minor* cut to his ear, likely would have rendered a different result on retrial. At best, under these circumstances, the evidence relates to the particular officers' credibility, which is insufficient grounds for granting a new trial.[3] We therefore

conclude that defendant is not entitled to a new trial on the basis of newly discovered evidence.

We remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Codefendant, Perry Scott, was charged and acquitted in a separate trial.

[2]We note that defendant cited a New York appellate court holding that suggesting that jurors "so the right thing' was improper. *People v Kirkland*, 199 AD2d 54; 605 NYS2d 27 (1993). However, that court ultimately concluded that the comment and other improper remarks were not so prejudicial as to deny the defendant a fair trial. *Id.*

[3]We not that the officers respectively testified that they did not "recall," "did not have [the] information," or "did not believe so." It would be a troublesome task to conclude from their uncertain testimony that the officers were deliberately "lying" as defendant would have us to do.

APPENDIX D

ORDER
Entered: June 19, 1997

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

109511

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A, Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v SC: 109511
COA: 178342
LC: 93-009499

JERRY LORENZO BASS,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered and, pending further order of this Court, we STAY the precedential effect of the April 25, 1997 judgment of the Court of Appeals insofar as it held that indigent criminal defendants are entitled to a transcript of the jury voir dire without satisfying the requirements of MCR 6.425(F)(2)(a)(i). The application for leave to appeal remains under consideration.

Cavanagh and Kelly, JJ., dissent from the entry of this order.

60619

I CORBIN R. DAVIS, Clerk of the Michigan

Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

APPENDIX E
STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, FOR PUBLICATION
April 25, 1997
9:25 a.m.

v

JERRY BASS, No. 178342
Defendant-Appellant. Recorder's Court
LC No. 93-009499

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM

Defendant was convicted, following a jury trial, of delivery of less than fifty grams of cocaine, MCL 333.7401(1)(2)(a)(iv), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Pursuant to an agreement with the prosecutor, defendant pleaded guilty of being an habitual offender, second offense, MCL 769:10; MSA 28.1082, and a charge of habitual offender, fourth offense, was dismissed. Defendant was sentenced to eight to twenty years' imprisonment for each of his cocaine convictions. Those sentences were vacated and defendant was sentenced to twelve to thirty years' for habitual

offender, second offense. Defendant appeals as of right. We remand.

On December 12, 1993, at approximately 4:30 p.m., Detroit police officers were conducting an undercover "buy and bust" narcotics operation near Cass and West Alexandrine in the City of Detroit. Officer Carl Moore drove to an area in an unmarked car with this partner, Officer Ronald Finnely The officers saw defendant and Perry Scott, the codefendant, standing on the corner of Cass and West Alexandrine. According to the officers, Scott was "Flagging" down passing motorist. Officer Moore existed the car and approached Scott, who was standing within six feet of defendant. Officer Moore inquired whether Scott had any cocaine for sale, and tendered $20 as pre-payment for two rocks of cocaine. Scott, in turn, passed the money to defendant, who gave him the cocaine. Scott handed the cocaine to Officer Moore, who then walked back to the car. As Officer Moore approached the car, Officer Finnely observed a white car stop at the corner and defendant had something to its occupants. Officers Moore and Finnely radioed other officers, who were waiting nearby, and provided them with descriptions of

defendant and Scott so they could make arrests.

Upon receiving descriptions of defendant and Scott, Lieutenant James Lashbrook and Officer Andrew Gammichia drove an unmarked van to the corner, where they were met by a marked patrol car containing Officers Kevin Robinson and Dennis Griffith. As they approached, they saw defendant walking away from the corner. Officers Griffith and Gammichia observed defendant discarding packages of suspected cocaine. While Lieutenant Lashbrook collected the discarded packets, Officer Gammichia arrested defendant. Scott was also arrested. The substances sold to Officer Moore and discarded by defendant were tested and found to contain cocaine.

Lieutenant Lashbrook and Officer Robinson depa.ted within minutes of defendant's arrest and proceeded to the corner of Cass and Selden, where the white car had stopped. As Officer Robinson approached the car, he noticed a gun in the console area and several small envelopes that he suspected contained drugs on the floor. The officers arrested the occupants of the car, Leland Simms and Patrick Mitchell. One of the men possessed the $20 dollar bill used by

Officer Moore to purchase the cocain. This ended the officers' versions of the December 12, 1993, events.

Defendant testified on his own behalf and gave a different account of the events that transpired. According to defendant, he was in the area of Cass and Alexandrine with Patrick Mitchell to search for a place to live. After giving change to a man on the street, he entered the Huntington Hotel to inspect a room that was for rent. Finding the room unsatisfactory, defendant prepared to leave the hotel. Defendant was walking toward the hotel doors when a stranger said that the police was outside. Upon leaving the building, defendant parted company with Mitchell.

Defendant testified that, once outside the hotel, Officer Robinson repeatedly slammed him into a tree, causing a laceration on his head. According to defendant, Officer Gammichia told Officer Robinson that they had messed up. Defendant added that, during the ride to the precinct, Lieutenant Lashbrook inquired whether they could "square it" by releasing him. Defendant claimed that he was bleeding profusely during the ride to the station and indicated that he was later taken to Detroit Receiving Hospital for

treatment. Although medical records confirmed that defendant was treated in the hospital, a photograph of him taken shortly after he arrived at the precinct merely revealed, in defendant's words, "speckles" or "spots" of blood on his white shirt. Defendant claimed that the photo was altered.

Defendant first argues that he was denied a fair trial by improper remarks by the prosecutor during closing argument. Improper prosecutorial remarks are grounds for reversal where they deny the defendant a fair and impartial trial. *People v Bahoda,* 448 Mich, 261, 266-267; 531 NW2d 659 (1995); *People v Messenger,* ___ Mich App ___ (Docket No. 178923, issued 1/21/97), slip op p.4. Defendant did not, however, object to any of the remarks he now claims were improper. Appellate review of prosecutorial remarks is generally precluded absent an objection because the trial court was deprived of an opportunity to cure the error. *Messenger, supra.* Reversal is warranted in the absence of an objection if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id.*

Defendant initially contends that the prosecutor shifted the burden of proof when he argued that the jury should decide whether to believe defendant or the prosecution witnesses and return a verdict consistent with that determination. We disagree. The prosecutor stated, in relevant part:

> There really is no room for innocent mistake, I don't believe, looking at the evidence of the case. Either the police officers are lying about this man selling dope or this man is lying about being in the area looking for a hotel room and doing nothing and getting his [sic] banged into the tree. I don't think the evidence shows anything else.
>
> As we talked abut before, and I'm going to talk about now, a criminal case boils down to one thing, reason and common sense. Reason and common sense. That's going to tell you who to believe. That's going to tell you who not to believe. That's going to tell you whether the man's guilty or not guilty.
>
> * * *
>
> If [defendant's) testimony makes sense, those police officers are lying. No other way about it. If the police officers are telling the truth, he's lying.

A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because this argument tends to shift the burden of proof. *People v Foster*, 175 Mich App 311, 317; 437

Mich 395 (1989), rev'd on other grounds 450 Mich 94 (1995). A prosecutor may, however, argue that the defendant or another witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

In support of his claim of prosecutorial misconduct, defendant relies on the Second Circuit decision in *United States v Richter*, 826 F2d 206 (CA 2, 1987). In *Richter*, the court found that, during cross-examination, the prosecutor's questions compelled the defendant to state that an FBI agent was lying when he testified in a way that conflicted with the defendant's testimony. *Id* at 208. The court stated "[d]eterminations of credibility are for the jury . . . not for witnesses . . . [and therefore] prosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper." *Id* at 208 (citations omitted). The court concluded that reversal was required because the prosecutor compounded the error by calling a rebuttal witness to bolster the FBI agent's credibility and remarking in closing argument that if the defendant was innocent, the FBI agents were lying and committed perjury. *Id.* at 208-209. The court further

noted that the prosecutor misstated the law when he remarked that if the agents were telling the truth, the defendant was guilty. *Id.* at 209.

In reviewing subsequent cases, it becomes readily apparent that the Second Circuit Court has been reluctant to expand its decision in *Richter* beyond the narrow and specific facts of that case. *United States v Gaind*, 31 F3d 73 (CA 2, 1994); *United States v Weiss*, 930 F2d 185 (CA 2, 1991), cert den 502 US 842; 112 S Ct 133; 116 L Ed 2d 100 *(1991); United States v Durrani*, 835 F2d 410 (CA 2, 1987). The statement in *Gaind, supra* at 77, that relief will not be warranted unless the defendant can demonstrate the same "starkly offensive prosecutorial delinquencies" found in *Richter*, essentially limits *Richter* to its facts.

In any event, unlike *Richter, supra*, defendant's argument is premised exclusively on improper comments during closing argument. Other federal courts have considered this issue with varying results. In *United States v Vargas*, 583 F2d 380, 386-387 (CA 7, 1978), the Seventh Circuit held that the prosecutor's equating of a not guilty verdict with a finding that government agents were

lying and a guilty verdict with their telling the truth was improper because it distorted the burden of proof by suggesting what the jury must find to reach a verdict. The court reasoned that, even assuming that there were unavoidable contradictions in the respective testimony, it did not follow that in order to acquit, the jury must believe that the government agents lied. The court indicated that credibility determinations are but one factor in determining whether evidence was sufficient. In effect, the prosecutor's comments left no room for the jury to "return a verdict of not guilty because the evidence might not be sufficient to convict defendant beyond reasonable doubt." *Id* at 387.

In cases decided after *Vargas*, courts have concluded that similar remarks did not necessitate reversal. For example, in *United States v Diaz -Carreon*, 915 F2d 951, 956 (CA 5, 1990), the Fifth Circuit agreed with the *Vargas* court that error occurs when a prosecutor argues that an acquittal requires its witnesses to be disbelieved and the defense witnesses to be believed. The Fifth Circuit, however, distinguished *Vargas* by considering the argument in context to determine the comment's prejudicial effect. *Id* at 957. The *Diaz* -

Carreon prosecutor stated that the jury would either believe the defendant and not everyone else, or believe the other witnesses and not the defendant. *Id* at 956. The court noted that the prosecutor's comments followed defense counsel's attack on the credibility of the prosecution witnesses and properly stressed that witness credibility was a crucial issue in the case. The court held that the continents were permissible because the prosecutor never informed the jurors of what they must find to reach a verdict. In so holding, the court emphasized that the prosecutor merely intended to inform the jurors that they were likely to believe one side's witnesses or that the government witnesses were the most believable. *Id.* at 957.

Also, in *United Stated v Marshall,* 75 F3d 1097 (CA 7, 1996), the Seventh Circuit held that the prosecutor's comments did not deny defendant a fair trial. The court noted that the prosecutor did not present the jury with "stark, bright-line, and absolute alternatives that might serve to distort the burden of proof" *Id* at 1108. Rather, the prosecutor stated that the jury should find the defendant not guilty if it believed the government agent was lying, but did not exclude other ways of reaching the same conclusion. Id.

In the instant case, the conduct of the prosecutor was not identical to the "starkly offensive" conduct of the prosecutor in *Richter, supra, or Vargas, supra.* The statements made during closing argument did not expressly state that a verdict for the defendant would require a finding that all of the government's witnesses were lying. The prosecutor focused on the credibility issue and repeatedly noted that because the testimony could not be reconciled, either the . police officers or defendant was lying. The prosecutor did not inform the jurors of what they must find to convict or acquit. Nor did the prosecutor exclude other ways to reach a verdict. We therefore conclude that the prosecutor's remarks do not require reversal.

Defendant also contends that the prosecutor made an improper civic-duty argument when he urged the jury to "do the right thing" and "do justice." The prosecutor remarked as follows:

> Ladies and gentlemen, when you're deciding this case, you're not supposed to decide upon whether you like this man, whether you feel sorry for this man or whether you hate this man. It has nothing to do with this case. *This case is about doing the right thing. About looking at the evidence. About deciding what evidence to believe. About trying to do justice. About trying to do justice.* [Emphasis added.]

Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *Bahoda, supra* at 282. Prosecutors, however, should not resort to civic duty arguments that appeal to the fears and prejudices of jurors. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. Id.

Having reviewed the remarks in context, we conclude that they did not deny defendant a fair and impartial trial. The remarks "do justice" and "do the right thing" occurred at the end of a lengthy discussion of the evidence and were followed by further comments on the evidence. The remarks were isolated, and the prosecutor's argument was otherwise proper.[2] Moreover, an objection and curative instruction could have eliminated any prejudicial effect. *Messenger, supra.*

Defendant also raises several claims of ineffective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show

that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant argues that he was denied the effective assistance of counsel by trial counsel's failure to object during the prosecutor's closing argument. As discussed previously, defendant was not denied a fair and impartial trial by the prosecutor's conduct. Therefore, defense counsel's failure to object to those remarks did not affect the outcome of the trial.

Defendant also argues that trial counsel was ineffective for failing to obtain the transcript of Scott's trial in order to use the police officers' prior testimony for impeachment purposes, and for failing to call Scott and Mitchell as witnesses at defendant's trial.

Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense, *People v Hoyt,* 185 Mich App 531, 537-538; 462 NW2d 793 (1990); *People v Julian,* 171 Mich App 153, 158-159; 429 NW2d 615 (1988); *People v*

Wilson, 159 Mich App 345, 354; 406 NW2d 294 (1987). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly,* 186 Mich App 524, 526; 465 NW2d 569 (1990). Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy. *Julian, supra.* In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the accused. People *v Caballero,* 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). This Court will not secondguess defense counsel's trial strategy. *People v Barnett,* 163 Mich App 331, 338; 414 NW2d 378 (1987).

In support of his claim that trial counsel should have had a transcript of Scott's trial prepared so that the police officers' testimony could be used for impeachment purposes, defendant cites two instances where the testimony was potentially inconsistent. The first instance occurred when Officer Moore testified at Scott's trial that he saw a car stop in response to Scott's motioning, while Officer

Finnely testified that he did not see a car stop. The witnesses, however, did not testify with respect to this issue at defendant's trial. The second instance occurred when Officer Moore testified at Scott's trial that Officer Finnely provided a description of the suspects to an arrest team, but at defendant's trial, he testified that he provided the description.

Having reviewed the testimony, we find that this claim is without merit. Contrary to defendant's assertion, Scott was not acquitted on the basis of inconsistencies in the officers' testimony. While the court that tried Scott noted an inconsistency in the testimony, it ultimately found Scott not guilty because it questioned whether he was involved in the drug deal. Given the police officers' firm identification testimony and evidence that cocaine was discarded by defendant, we find that trial counsel's failure to impeach other portions of their testimony did not deprive defendant of the effective assistance of counsel where knowledge of the minor discrepancies in the officers' testimony would not have affected the outcome of trial.

Defendant also asserts that trial counsel should have called Scott

and Mitchell as witnesses at his trial. Here, trial counsel was appointed to represent defendant at his trial and during his testimony at Scott's trial. At Scott's trial, Mitchell's testimony paralleled that provided by defendant. Mitchell testified that he and defendant rode on the bus to the area of Cass and Alexandrine and looked for a hotel room. After leaving the hotel, they walked in different directions. Mitcheli obtained a ride from Simms, and was arrested when the police found his heroin after stopping the car in which he was the passenger. Scott testified that he did not know defendant, did not see anyone selling drugs, and was not himself selling drugs. He also stated that he was slammed against a wall and arrested by the police officers who exited the van.

Trial counsel was present for defendant's testimony on December 17, 1993, but was not present when Scott and Mitchell testified on December 22, 1993. Trial counsel, nevertheless, was aware that Scott and Mitchell were potential witnesses because defendant testified at Scott's trial. Had the witnesses testified at defendant's trial, they may have aided in his defense because Mitchell would have corroborated defendant's testimony and Scott

would have confirmed that he had no connection with defendant. Given the conflicting version of events presented by the officers and defendant, the additional testimony in support of defendant's story may well have made a difference in the outcome at trial. Because, however, the decision to call witnesses is a matter of trial strategy, we cannot determine, based on the record before us, whether trial counsel had a reason for not calling these witnesses. We therefore remand for an evidentiary hearing at which trial counsel can explain her reasons for not calling the witnesses. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant further argues that he is entitled to receive a transcript ot the jury voir dire because the denial of a transcript violates his right to equal protection and to the effective assistance of counsel. Although defendant failed to raise this issue below, we win consider it because it involves a constitutional issue. *People v Zinn*, 217 Mich App 340, 344; 551 Nw2d 704 (1996). Constitutional issues are reviewed de novo on appeal. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

Defendant first contends that the court rules restricting the

ability of an indigent defendant to obtain a transcript of voir dire proceeding are unconstitutional. MCR 6.425(F)(2)(a)(i) directs that in the order appointing a lawyer for an indigent defendant, the trial court must direct the court reporter to prepare and file:

> the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause.

Under MCR 6.433 (A), an indigent defendant may request transcripts, and the court must order the preparation of transcripts unless they have already been ordered pursuant to MCR 6.425(F)(2). However, consistent with MCR 6.425, MCR 6.433(D) provides that:

> [t]he court shall not order the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of fife imprisonment without the possibility of parole, or shows good cause.

Defendant argues that the requirement that he demonstrate good cause for the transcript violates his right to equal protection and the effective assistance of counsel.

In Griffin v Illinois, 351 US 12, 17-19; 76 S Ct 585; 10 L Ed

891 (1956), the Supreme Court held that, to satisfy the commands of the Equal Protection Clause, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights. *Id.* at 19. *Griffin* and its progeny command that a State must "provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v North Carolina*, 404 US 226, 227; 92 S Ct 431; 30 L Ed 2d 400 (1971). In the context of providing transcripts to indigent defendants, the Supreme Court explained in *Britt:*

> In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. [Id (footnote omitted).]

In Draper v Washington, 372 US 487, 497; 83 S Ct 774; 9 L Ed 899 (1963), the Supreme Court explained that it is only necessary that the State furnish a "record of sufficient completeness" for adequate consideration of defendant's claims of error. In *Mayer v Chicago*, 404 US 189, 195; 92 S Ct 410; 30 L Ed 2d 372 (1971), the Supreme Court held that, while a full transcript is not automatically

required, once an indigent defendant makes out "a colorable need for a complete transcript," the burden is on the State to show that a portion of the transcript or an "alternative" was suffice. See, also, *United States v Devlin*, 13 F3d 1361, 1363-64(CA9, 1994).

In this case, we find that defendant has made no effort to demonstrate either a "colorable need" or "good cause" for a transcript of the voir dire proceedings. Under identical circumstances, the courts of other jurisdictions have generally held that *Griffin* and its progeny do not require the production of the voir dire transcript because it is not necessary to review the issues raised on appeal. See *Johnson v Arkansas*, 528 SW2d 367, 368 (Ark, 1975); *Goins v Meade*, 528 SW2d 680, 681-684 (Ky, 1975), cert den 424 US 972; 96 S Ct 1474; 47 L Ed 2d 741 (1976); *Louisiana v Robinson*, 302 So2d 270, 272 (La, 1974); *Green v Tennessee, 450* SW2d 27, 28-29 (Tenn Ct App, 1969). See also, *People v Hill*, 429 P2d 586, 598-599 (Cal, 1967), cert den 389 US 1009; 19 L Ed 2d 607; 88 S Ct 572 (1967). The Supreme Court of Ohio, however, reached the opposite result in *State ex rel Seigler v Rone*, 328 NF2d 811 (Ohio, 1975).

Like the majority of courts that have considered this issue, we conclude that defendant's constitutional right to equal protection does not entitle him to the production of the voir dire transcript proceedings. Pursuant to *Draper, supra,* the State is only required to provide transcripts of the portion of the proceedings germane to consideration of the issues raised on appeal. Here, defendant raises no issue on appeal that requires review of the voir dire transcript. We therefore conclude that the court rules governing the production of the voir dire transcript do not violate defendant's right to equal protection.

More troubling, however, is defendant's argument that MCR 6.425 is unconstitutional because it violates his right to effective assistance of counsel. Where a state grants criminal defendants an appeal as of right, it must also provide indigent defendants with an attorney to represent them on appeal. *Douglas v California,* 372 US 353, 358; 83 S Ct 814; 9 L Ed 2d 811 (1963). Under the Due Process Clause of the Fourteenth amendment, a criminal defendant is entlted to the effective assistance of counsel in his first appeal of right. *Evitts v Lucey,* 469 US 387, 396; 105 S Ct 830; 83 L Ed 2d

821 (1985).

The Michigan Legislature established the Appellate Defender Commission and assigned it the responsibility of developing a system of indigent appellate defense services. MCL 780.712; MSA 28.1114(102); MCL 780.713; MSA 28.1114(103). The Commission's regulations for the appointment of appellate counsel for indigent defendants and minimum standards for services provided by appointed counsel were approved by the Michigan Supreme Court in 1981. Administrative Order 1981-7, 412 Mich lxv (1981). The Court affirmed its order in 1985. Administrative Order No. 1985-3, 421 Mich lxvii (1985). Pursuant to the standards and directives of appellate counsel, counsel must request and review *all* transcripts and lower court records and assert meritorious claims based on the lower court record. Id at lxxxvi-lxxxviii.

In *Hardy v United States,* 375 US 277; 84 S Ct 424; 11 L Ed 2d 331 (1964), the Court held that, in a federal system where a defendant has an appeal of right and congress has enacted statutes to buttress that right, the entire transcript must be produced when appointed appellate counsel did not serve as trial counsel. The

Court reasoned as follows:

> *But when, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less, than that.* Rule 52 (b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The right to notice "plain errors or defects' is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended. [Id. at 279-280.]

The *Hardy* Court held that, under the circumstances of the case, the defendant was entitled to transcripts of the court's charge to the jury and the testimony presented by the prosecution and the defense. *Id* at 282. The Court relied on federal law and explicitly declined to consider whether a complete transcript was constitutionally required. *Id.*

We find that the remarks of the *Hardy* Court are equally applicable to the circumstances of this case. The standards for appointed appellate counsel require that counsel assert claims of error which are supported by the record and possess arguable legal merit. In order to faithfully discharge the duties imposed by the

Appellate Defender Commission and the Supreme Court, counsel must have access to transcripts of all the proceedings so that he can raise all issues of legal merit. Although appellate counsel could contact trial counsel and inquire about voir dire, information obtained from trial counsel is not a substitute for a transcript because trial counsel's memory may be faulty, trial counsel may not be aware that an error occurred during voir dire, id at 280 n 3, or trial counsel may be the target of defendant's claim of error. We therefore conclude that a transcript of voir dire must be provided in all cases where appointed appellate counsel was not the indigent defendant's trial counsel. Accordingly, in this case, we find that defendant is entitled to a transcript of the voir dire testimony, to determine if any justifiable claims of error occurred during the voir dire.

Defendant also argues that his twelve to thirty-year sentence for habitual offender, second offense, is disproportionate. We disagree. This Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality. *People v Gatewood (On Rem)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The principle of proportionality

requires that the sentence imposed be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn,* 435 Mich 630, 636; 461 NW2d 1 (1990).

We find that defendant's twelve to thirty-year sentence is proportionate. Contrary to defendant's contention, his twelve prior felony convictions, even if property offenses, place him among more serious offenders. As the trial court aptly noted when sentencing defendant, he clearly does not intend to live by the rules of society. Given defendant's lengthy criminal record and his conviction of delivery of cocaine offenses, defendant's twelve to thirty-year sentence is proportionate to the offense and the offender.

To the extent that defendant argues that he is entitled to be resentenced because the trial court misapplied or misunderstood the law when it determined that the habitual offender statute increased the upper end of the guidelines range by fifty percent, this challenge does not state a cognizable claim for relief. The Michigan Supreme Court recently recognized that "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines,

instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell,* 454 Mich 145, 176-177; ___ NW2d _____ (1997). "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) *the sentence is disproportionate." Id.* at 177. We concluded that defendant's sentence is proportionate, and thus *Mitchell* precludes this claim.

We remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

1Codefendant, Perry Scott, was charged and acquitted in a separate trial.

2 We note that defendant cited a New York appellate court holding suggesting that jurors "do the right thing" was improper. *People v Kirkland,* 199 AD2d 54; 605 NYS2d 27, 29 (1993). However, that court ultimately concluded that the comment and other improper remarks were not so prejudicial as to deny the defendant a fair trial. *Id*